



THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
MEDIA SUMMARY OF JUDGMENT DELIVERED IN THE SUPREME COURT OF
APPEAL

From: The Registrar, Supreme Court of Appeal

Date: 28 NOVEMBER 2022

Status: Immediate

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Samancor Chrome Limited v Bila Civil Contractors (Pty) Ltd (Case no 810/2021) [2022] ZASCA 163 (28 November 2022)

Today, the Supreme Court of Appeal (SCA) dismissed with costs an appeal against a decision of the Gauteng Division of the High Court, Pretoria (the high court).

The issue before the SCA was whether the respondent, Bila Civil Contractors (Pty) Ltd (Bila) was in contempt of two court orders granted by the high court, per Neukircher J on 1 July 2019 and Janse van Nieuwenhuizen J on 10 December 2019, respectively.

Samancor is the co-owner and the holder of a converted mining right in respect of the Remaining Extent Portion 2 of the farm, Elandskraal 469 JQ (RE Portion 2). It has the sole and exclusive right to mine and recover chrome in, on and under RE Portion 2. Bila has a prospecting right for chrome ore over RE Portion 2. In terms of this right, it is entitled to remove and dispose, for its benefit, chrome ore and other minerals found during prospecting operations on RE Portion 2.

On 12 June 2019, Samancor lodged an urgent application in the high court for an order interdicting Bila, its employees, and contractors from conducting unlawful mining operations on RE Portion 2. In resisting Samancor's application, Bila denied that it was conducting unlawful mining activities. The matter served before Neukircher J, who found in favour of Samancor on 1 July 2019. Bila applied for leave to appeal against Neukircher J's order, which was dismissed on 12 August 2019.

On 8 September 2019, Samancor lodged another application in the high court for an order, joining Bila's directors as respondents, and for Bila and its directors to be held in contempt of the order granted by Neukircher J on 1 July 2019. Samancor's second application was heard by Van der Westhuizen J, who dismissed it on 30 September 2019 on the basis that Samancor could not obtain an order for contempt 'summarily against the respondents [Bila's directors] without them being granted a need to be heard'.

On 7 October 2019, Bila applied for leave to appeal Neukircher J's order to this Court, which was dismissed on 30 November 2019. Nearly eight months later, on 22 July 2020, it applied for leave to appeal to the Constitutional Court, which was dismissed on 13 November 2020.

The dismissal of the application for leave to appeal by this Court on 30 November 2019, made Neukircher J's order operative and enforceable until 22 July 2020, when an application for leave to appeal was lodged to the Constitutional Court.

On 13 July 2020, Samancor lodged another application, which is the subject of this appeal, for an order holding Bila in contempt of the orders granted by Neukircher J on 1 July 2019 and Janse van Nieuwenhuizen J on 10 December 2019. Fourie J heard that application. Counsel for Samancor submitted that the difference between the application that served before Van der Westhuizen J in respect of Neukircher J's order and the one heard by Fourie J was the applicable contempt period.

According to Samancor, Bila continued to conduct mining and prospecting activities on RE Portion 2 despite the lodgement of the internal appeal with the Department of Environment, Forestry and Fisheries, in terms of the National Environmental Management Act 107 of 1998 (NEMA), against the decision to grant Bila an environmental authorisation, in respect of a prospecting right that had been granted to it over RE Portion 2. In terms of s 43(7) of NEMA, an appeal suspends an environmental authorisation. Activities by Bila on RE Portion 2 were accordingly suspended.

Because of this conduct, Samancor lodged an urgent application to the high court seeking an order interdicting Bila from conducting any activities on RE Portion 2 until the internal appeal had been determined. On 10 December 2019, Janse van Nieuwenhuizen J granted an order interdicting Bila from being involved, in any manner whatsoever, in any activities, including prospecting operations on RE Portion 2, pending the outcome of the appeal.

In its defence, Bila contended that the orders were not capable of being breached, as they were not operative. Neukircher J's order, so it contended, was automatically suspended by virtue of the provisions of s 18(1) of the Superior Courts Act 10 of 2013 (the Superior Courts Act) as the papers seeking leave to appeal to the Constitutional Court had then been filed. In respect of Janse van Nieuwenhuizen J's order, Bila alleged that although the order was of an interim nature, it was final in effect, and therefore its operation was suspended upon the lodging of the application for leave to appeal against it.

The SCA found that Fourie J was correct in dismissing this defence because Janse van Nieuwenhuizen J's order was interlocutory in nature and therefore not suspended as s 18(2) of the Superior Courts Act explicitly provides. Neukircher J's order remained operational during the period of 30 November 2019 and 22 July 2020. It was similarly not suspended during the period in which Samancor claimed the unlawful activities were taking place.

In respect of non-compliance with Neukircher J's order, the SCA found that the allegations made by Samancor were too wide and difficult to devise into the particular period, given that the contempt was alleged to only be in respect of the period from 30 November 2019 to 22 July 2020. This may be because of the manner in which the allegations were made, which left gaps and required the court to put pieces together for it to understand how the infringement could be attributed to that period. Samancor clumped together allegations dealing with both the orders of Janse van Nieuwenhuizen J and Neukircher J.

The problem with that approach was that, all that was required to be shown in respect of Janse van Nieuwenhuizen J's order was that Bila had conducted prospecting operations after the granting of the order. In contrast, insofar as Neukircher J's order was concerned, Samancor had to show that Bila was mining after 30 November 2019 to 22 July 2020. For those reasons, the SCA found that Samancor had not clearly established the breach of Neukircher J's order beyond a reasonable doubt.

As regards Janse van Nieuwenhuizen J's order, to rebut an inference of wilfulness and *mala fides*, Bila contended that it acted on legal advice that the order was automatically suspended by virtue of it lodging a notice of application for leave to appeal that order. Furthermore, although it was interim in nature, it was final in effect. The SCA found that the alleged legal advice was in respect of an issue that was legal in nature. It depended on the interpretation of the order, its context and particular circumstances. It held that although the legal advice was later found to have been incorrect, this did not detract from the fact that it was given and Bila accepted it in good faith. Even if Bila's acceptance of the advice could be said to be unreasonable, if it is accepted that it was received *bona fide*, it would not amount to contempt. In the result, Fourie J's conclusion that sufficient evidence had been provided by Bila, creating reasonable doubt that its non-compliance with Janse van Nieuwenhuizen J's order was not wilful and *mala fide*, could not be faulted.

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